DDL & Anor v Pendaftar Besar Kelahiran dan Kematian Malaysia

HIGH COURT (MELAKA) — CIVIL SUIT NO MA-24NCvC-60–03 OF 2022
MOHD RADZI ABDUL HAMID J
2 JANUARY 2024

Citizenship — Operation of law — Declaration — Malaysian husband and wife ('plaintiffs') who adopted child eight months after her birth in Malaysia to Sri Lankan mother applied for declaration that child was Malaysian citizen by operation of law — Whether criteria to qualify for citizenship by operation of law under Federal Constitution ('FC') were not met — Whether fact plaintiffs were adoptive parents and Malaysians was not material in determining citizenship under FC as 'parent' in citizenship provisions in FC referred only to biological parent — Whether plaintiffs failed to prove that at time of child's birth, either one of child's biological parents was Malaysian or permanent resident in Malaysia — Whether plaintiffs also failed to alternatively prove that child was 'found exposed', abandoned and stateless — Whether since child's biological father was unknown, child would follow biological mother's citizenship

The plaintiffs, who were husband and wife and Malaysian citizens, sought a declaration that their adopted child, RAPD, was a Malaysian citizen by operation of law pursuant to art 14(1)(b) read together with s (1)(a) under Part II and s 19B under Part III of the Federal Constitution ('the FC') or, alternatively, pursuant to art 14(1)(b) read together with s (1)(e) and s 2(3) under Part II of the Second Schedule of the FC. RAPD was born on 14 March 2019 to a Sri Lankan woman ('the biological mother') at a government hospital in Johor. Some eight months after the birth, the biological mother allowed the plaintiffs to adopt RAPD and raise the child as their own. The plaintiffs filed a late registration of RAPD's birth whereupon the National Registration Department issued a birth certificate ('BC') which stated the name and passport number of the child's biological mother. The biological father of the child was not known. Following the plaintiffs' formal adoption of RAPD, a new BC was issued which described the plaintiffs as the child's parents. However, since RAPD was still categorised in the BC as 'non-citizen', the plaintiffs filed the instant application for declaration on two alternative grounds — first, that by virtue of the fact that the latest BC showed that RAPD was the child of Malaysian citizens, she acquired citizenship under s 1(a) of Part II of the FC by operation of law; secondly, that since RAPD was abandoned by her biological mother and the child did not acquire citizenship of any country within 12 months from the date of birth, RAPD acquired citizenship by operation of law pursuant to s 1(e) and s 2(3) of Part II, Second

Schedule read together with s 19B of Part III, Second Schedule of the FC.

Held, dismissing the plaintiffs' application:

(1) This court was bound by stare decisis to follow the decisions of the Court of Appeal in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor* [2017] 3 MLJ 308 ('Pang Wee See') and of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara Malaysia & Ors* [2021] 4 MLJ 2361 ('CTEB'). It was held in the former that the word 'parent' meant biological parent and did not include adoptive parent, that the provisions of the Adoption Act 1952 could not be used to interpret the word 'parent' in s 1(a), Part II, Second Schedule of the FC, that in determining citizenship both the principles of *jus soli* and *jus sanguinis* must be proved and that in respect of the principle of *jus sanguinis*, the applicant must prove that at the time of his birth, one of his parents was either a Malaysian citizen or a permanent resident in Malaysia. *CTEB* approved of the application of the *jus soli* and *jus sanguinis* principles in determining citizenship and also affirmed that the word 'parent' excluded non-biological parents such as adoptive parents (see paras 13–15 & 16).

(2) The plaintiffs had failed to discharge the burden of proving that at the time of birth at least one of the child's parents was either a Malaysian citizen or a permanent resident in Malaysia. The parent 'at the time of birth' obviously could not refer to the adoptive parent. On the facts, this court found on balance of probabilities that the biological mother was a citizen of Sri Lanka and not of Malaysia. There was no evidence that the biological mother was a permanent resident of Malaysia or that she had entered Malaysia legally or that her presence in Malaysia was as a permanent resident. The court could not therefore grant the declaration sought by the plaintiffs on their first ground (see paras 17, 19–20 & 22–23).

(3) Based on *Pang Wee See*, the Adoption Act 1952 played no material role in the determination of citizenship under the FC. Hence, the fact that the plaintiffs as the child's adoptive parents were Malaysians could not be taken into account as of right. The plaintiffs still had to prove that the child was not born a citizen of any other country. Since the child's biological mother was a Sri Lankan citizen, it could not be said that the child was stateless but followed the mother's citizenship since the child's biological father was unknown. The burden was on the plaintiffs to show why the child was not entitled to Sri Lankan citizenship, and this they had failed to do (see paras 25–26 & 28).

(4) RAPD was not 'found exposed' within the meaning of s 19B of Part III, Second Schedule, of the FC. The facts showed that following the birth, the child remained with the biological mother for some eight months

before she was given to the plaintiffs for adoption. There was thus no abandonment amounting to leaving the child exposed without any trace of the biological parent. Since the child was not 'found exposed', the presumptions under s 19B did not operate — namely, the presumption that the child was born to a mother who was permanently resident at the place where the child was found and the presumption that the date of the finding was the date of the child's birth (see paras 30 & 33–34).

(5) The criteria for citizenship by operation of law under the FC was not met and the plaintiffs' application had to be dismissed (see para 37).

[Bahasa Malaysia summary

Plaintif, yang merupakan suami isteri dan warganegara Malaysia, memohon satu deklarasi bahawa anak angkat mereka, RAPD, adalah warganegara Malaysia mengikut penguatkuasaan undang-undang menurut perkara 14(1)(b) dibaca bersama s (1)(a) di bawah Bahagian II dan s 19B di bawah Bahagian III Perlembagaan Persekutuan ('PP') atau, secara alternatif, menurut perkara 14(1)(b) dibaca bersama s (1)(e) dan s 2(3) di bawah Bahagian II Jadual Kedua PP. RAPD dilahirkan pada 14 Mac 2019 kepada seorang wanita Sri Lanka ('ibu kandung') di sebuah hospital kerajaan di Johor. Kira-kira lapan bulan selepas kelahiran, ibu kandung membenarkan plaintif mengambil RAPD dan membesarkan anak itu sebagai anak mereka sendiri. Plaintif memfailkan pendaftaran lewat kelahiran RAPD di mana Jabatan Pendaftaran Negara mengeluarkan sijil kelahiran ('SK') yang menyatakan nama dan nombor pasport ibu kandung kanak-kanak itu. Bapa kandung kanak-kanak itu tidak diketahui. Berikutan pengambilan RAPD secara rasmi oleh plaintif, SK baharu telah dikeluarkan yang menggambarkan plaintif sebagai ibu bapa kanak-kanak itu. Walau bagaimanapun, memandangkan RAPD masih dikategorikan dalam SK sebagai 'bukan warganegara', plaintif memfailkan permohonan semasa untuk satu deklarasi atas dua alasan alternatif — pertama, berdasarkan fakta bahawa SK terkini menunjukkan bahawa RAPD adalah anak warganegara Malaysia, dia memperoleh kewarganegaraan di bawah s 1(a) Bahagian II PP melalui penguatkuasaan undang-undang; kedua, memandangkan RAPD telah ditinggalkan oleh ibu kandungnya dan kanak-kanak itu tidak memperoleh kewarganegaraan mana-mana negara dalam tempoh 12 bulan dari tarikh lahir, RAPD memperoleh kewarganegaraan melalui penguatkuasaan undang-undang menurut s 1(e) dan s 2(3) Bahagian II, Jadual Kedua dibaca bersama s 19B Bahagian III, Jadual Kedua PP.

Diputuskan, menolak permohonan plaintif:

(1) Mahkamah ini terikat dengan stare decisis untuk mengikuti keputusan Mahkamah Rayuan dalam *Pendaftar Besar Kelahiran dan Kematian, Malaysia lwn Pang Wee See & Anor* [2017] 3 MLJ 308 ('Pang Wee See') dan Mahkamah Persekutuan dalam *CTEB & Anor v Ketua Pengarah*

Pendaftaran Negara Malaysia & Ors [2021] 4 MLJ 2361 ('CTEB'). Ianya telah diputuskan terdahulu bahawa perkataan 'ibu bapa' bermaksud ibu bapa kandung dan tidak termasuk ibu bapa angkat, bahawa peruntukan Akta Pengangkatan 1952 tidak boleh digunakan untuk mentafsir perkataan 'ibu bapa' dalam s 1(a), Bahagian II , Jadual Kedua PP, bahawa dalam menentukan kewarganegaraan kedua-dua prinsip *jus soli* dan *jus sanguinis* mesti dibuktikan dan berkenaan dengan prinsip *jus sanguinis*, pemohon mesti membuktikan bahawa pada masa kelahirannya, salah seorang daripada ibu bapanya adalah sama ada warganegara Malaysia atau pemastautin tetap di Malaysia. *CTEB* mengukuhkan penggunaan prinsip *jus soli* dan *jus sanguinis* dalam menentukan kewarganegaraan dan juga mengesahkan bahawa perkataan 'ibu bapa' mengecualikan ibu bapa bukan kandung seperti ibu bapa angkat (lihat perenggan 13–15 & 16).

(2) Plaintif telah gagal untuk melepaskan beban membuktikan bahawa pada masa kelahiran sekurang-kurangnya seorang daripada ibu bapa kanak-kanak itu sama ada warganegara Malaysia atau pemastautin tetap di Malaysia. Ibu bapa 'pada masa kelahiran' jelas tidak boleh merujuk kepada ibu bapa angkat. Berdasarkan fakta, mahkamah ini mendapati berdasarkan imbangan kebarangkalian bahawa ibu kandung itu adalah warganegara Sri Lanka dan bukan Malaysia. Tiada bukti bahawa ibu kandung itu adalah pemastautin tetap Malaysia atau dia telah memasuki Malaysia secara sah atau kehadirannya di Malaysia adalah sebagai pemastautin tetap. Oleh itu, mahkamah tidak dapat memberikan deklarasi yang diminta oleh plaintif atas alasan pertama mereka (lihat perenggan 17, 19–20 & 22–23).

(3) Berdasarkan *Pang Wee See*, Akta Pengangkatan 1952 tidak memainkan peranan penting dalam penentuan kewarganegaraan di bawah PP. Oleh itu, fakta bahawa plaintif sebagai ibu bapa angkat kanak-kanak itu adalah rakyat Malaysia tidak boleh diambil kira sebagai hak. Plaintif masih perlu membuktikan bahawa kanak-kanak itu tidak dilahirkan sebagai warganegara mana-mana negara lain. Memandangkan ibu kandung kanak-kanak itu adalah warganegara Sri Lanka, ia tidak boleh dikatakan bahawa kanak-kanak itu bukan warganegara tetapi mengikut kewarganegaraan ibu kerana bapa kandung kanak-kanak itu tidak diketahui. Beban adalah pada plaintif untuk menunjukkan mengapa kanak-kanak itu tidak berhak mendapat kerakyatan Sri Lanka, dan ini mereka gagal melakukannya (lihat perenggan 25–26 & 28).

(4) RAPD tidak 'didapati terdedah' dalam pengertian s 19B Bahagian III, Jadual Kedua, PP. Fakta menunjukkan bahawa selepas kelahiran, kanak-kanak itu tinggal bersama ibu kandung selama kira-kira lapan bulan sebelum dia diberikan kepada plaintif untuk diambil sebagai anak angkat. Oleh itu, tiada pengabaian sama seperti membiarkan kanak-kanak itu terdedah tanpa sebarang jejak ibu bapa kandung.

Memandangkan kanak-kanak itu tidak 'didapati terdedah', anggapan di bawah s 19B tidak terpakai — iaitu, anggapan bahawa kanak-kanak itu dilahirkan oleh ibu yang bermastautin tetap di tempat kanak-kanak itu ditemui dan anggapan bahawa tarikh penemuannya ialah tarikh kelahiran kanak-kanak itu (lihat perenggan 30 & 33–34).

(5) Kriteria untuk kewarganegaraan melalui penguatkuasaan undang-undang di bawah PP tidak dipenuhi dan permohonan plaintif terpaksa ditolak (lihat perenggan 37).]

Cases referred to

Azimah bt Hamzah v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2023] 3 MLJ 227; [2023] 3 CLJ 475, CA (refd)

CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 1 CLJ 1, FC (refd)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 6 CLJ 471, FC (folld)

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285; [2012] 2 CLJ 925, FC (refd)

Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2022] 1 MLJ 137; [2022] 1 CLJ 491, CA (refd)

Eastern Health Board v An Bord Uchtála [1994] 3 IR 207, SC (refd)

Farah Hani Sukor v Ketua Pengarah Jabatan Pendaftaran Negara, Malaysia & Ors [2023] MLJU 993; [2023] 1 LNS 898, HC (distd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2018] 6 MLJ 548; [2017] 8 CLJ 412, CA (refd)

Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors [2018] 1 MLJ 307; [2018] 4 CLJ 758, CA (refd)

Minister of Home Affairs and Another v Collins Macdonald Fisher and Another [1980] AC 319, PC (refd)

Ng Kim Huat v PP [1961] 1 MLJ 308; [1961] 1 LNS 73 (refd)

Peguam Negara Malaysia & Anor v Go Fu Seng and other appeals [2023] 3 MLJ 277; [2022] 9 CLJ 336, CA (refd)

Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child) [2017] 3 MLJ 308; [2017] 7 CLJ 33, CA (folld)

Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662; [2017] 8 CLJ 16, CA (refd)

Legislation referred to

Adoption Act 1952 ss 9(1), 25A
Federal Constitution arts 14(1)(b), 15, Second Schedule, Part II, ss (1)(a), (1)(e), 2(3), Part III, s 19B

Pramod Nambiar (Francis Pereira & Shan) for the plaintiffs.
Zairani bt Tugiran (Federal Counsel, Malacca State Legal Advisor's Office) for the defendant.

Mohd Radzi Abdul Hamid J:

INTRODUCTION

[1] This is the grounds of decision of this court in respect of an application filed by the first and second plaintiffs acting on their behalf and as litigation representatives of a minor child named RAPD (name redacted to maintain anonymity) ('child') for a principal order under para 1 of encl 37 that the child be declared a citizen of Malaysia pursuant to the operation of art 14(1)(b) read together with s (1)(a) under Part II and s 19B under Part III of the Federal Constitution ('the FC') or alternatively, pursuant to the operation of art 14(1)(b) read together with ss (1)(e) and 2(3) under Part II of the Second Schedule of the FC ('application'). In addition to that principal order, the plaintiffs further seek relevant consequential orders as set forth in paras 2, 3, 4 and 5 therein.

BACKGROUND FACTS

[2] The child was born on 14 March 2019 to a woman known as DMPK ('the biological mother') at Hospital Sultanah Nora Ismail, Batu Pahat in the State of Johore. Some eight months later, on or about 24 November 2019, both plaintiffs were informed of the biological mother's desire to give up the child for adoption. An agreement was struck on the same day between them when the biological mother agreed to surrender all her parental and guardianship rights to both plaintiffs who would adopt the child as their own. Both plaintiffs are husband and wife and are Malaysian citizens.

[3] Since the birth of the child was not registered at the time of birth, a late registration of the birth was done by the plaintiffs on 24 November 2019 and a birth certificate dated 21 July 2020 was issued by Jabatan Pendaftaran Negara. In that certificate, the biological mother was identified as a Sri Lankan citizen bearing passport No N5224496. At the time of giving birth she was 37 years old. The biological father of the child is not known. The certificate was marked as 'Bukan Warganegara' ('first BC').

[4] Both plaintiffs then filed formal applications to adopt the child and the

relevant orders were granted by the Melaka Sessions Court on 28 October 2020. Following that order, a new birth certificate was issued dated 12 April 2021 wherein the first plaintiff is registered as the father and the second plaintiff as the mother. However, the new BC was marked as 'Bukan Warganegara' ('new BC'). Thus, the reason for the application.

[5] In this judgment, references to 'articles', 'Part II', 'Part III' and 'Second Schedule' are to that of the FC.

THE LAW ON CITIZENSHIP

[6] It has been decided in a string of cases and reiterated in the Court of Appeal decision in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308; [2017] 7 CLJ 33 and the recent Federal Court decisions in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471, FC and *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71; [2022] 1 CLJ 1, FC that the law on citizenship are exclusively provided in the FC. In delivering the decision of the court in *CCH*, Her Ladyship the Chief Justice Tengku Maimun set out a reminder on how such provisions are to be interpreted:

> [46] Citizenship no doubt is governed by Part III of the FC, but it is also a concept so inextricably linked to the right to life and personal liberty contained in art 5(1). As such, any provisions on it must be construed as widely as possible.
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> [47] Having said that, we are completely mindful of the following warning by Abdoolcader J (as he then was) in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, at p 360:
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> > I said in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ... that the Constitution is not to be construed in any narrow or pedantic sense (*James v Commonwealth of Australia* [1936] AC 578) ... but this does not mean that a court is at liberty to stretch or penvert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. (Emphasis added.)
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> [48] The courts have always had to do battle with these two conflicting principles. On the one hand, it is said that the judiciary cannot purport to usurp the role of the Legislature. On the other hand, it is said that the judiciary must be proactive to protect fundamental rights. No matter the argument, we are constantly reminded of these fears and/or duties by both sides taking their respective positions in constitutional cases. Where do we draw the line between these two extremes?
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> [49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB*. The starting point is the

understanding that fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism.

[50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.

[7] On the subject of rules of interpretation of the provisions of the FC, the Federal Court in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2012] 2 CLJ 925 held:

> One other important guide in interpretation of Constitution is that, the Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257).

DELIBERATIONS AND DECISION OF THIS COURT

[8] It is the plaintiff's case that the child is a citizen of Malaysia by operation of law on two alternative grounds:

(a) firstly ('first ground'), pursuant to the provisions of the Adoption Act 1952, the child having become a child of Malaysian citizens, acquires citizenship under s 1(a), Part II of the FC; or

(b) secondly ('second ground'), the child having been abandoned by the biological mother and not having acquired citizenship of any country within 12 months from the date of birth, acquires citizenship pursuant to ss 1(e) and 2(3) of Part II, Second Schedule read together with s 19B of Part III, Second Schedule.

On the first ground

[9] It was contended by counsel for the plaintiffs that the child ought to be

accorded citizenship pursuant to art 14(1)(b) read with s 1(a) of Part II on the basis that the word 'parent' in para (a) therein ought to be construed broadly to include adoptive parents. It was further argued that the provisions of the Adoption Act 1952 that is, s 9(1) and 25A which confer full legal rights on adoptive parents, are conclusive proof of the identity of the child's parent 'for all purposes'. It is the plaintiff's contention that the phrase 'for all purposes' means and includes the purposes of acquiring citizenship under s 1(a) of Part II.

[10] To advance the plaintiff's cause, counsel referred to the decision of the Court of Appeal in *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307; [2018] 4 CLJ 758 where the word 'parent' was interpreted broadly to include adoptive parents and not restricted to biological parents.

[11] It was further argued that this court should adopt a beneficent interpretation of the meaning of 'parent', such that parent can also mean lawful parents such as adoptive parents and not just biological parents. Since a legal adoption accords the adoptive parents status as parents, the law, in particular s 1(a) should not discriminate between biological and adoptive parents. A beneficent interpretation, if adopted by this court, would prevent the child from being rendered stateless and the family unit would be allowed to grow peacefully unburdened by all the social and legal stigma and challenges that the child would otherwise face growing up as a stateless person. Reference was made to the decisions in *Minister of Home Affairs and Another v Collins Macdonald Fisher and Another* [1980] AC 319, *Eastern Health Board v An Bord Uchtála* [1994] 3 IR 207 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

[12] In response, counsel for the respondents argues that in any determination of citizenship under the FC, both principles of *jus soli* and *jus sanguinis* of the biological parent and not the adoptive parent must be proven by the applicant. Reference was made to the Court of Appeal decisions in *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2018] 6 MLJ 548; [2017] 8 CLJ 412 and *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662; [2017] 8 CLJ 16. It was argued that the plaintiffs in this application failed to discharge the burden of proving *jus sanguinis* since the biological mother was a Sri Lankan.

[13] In approaching this issue, this court refers to the decision of the Court of Appeal in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308; [2017] 7 CLJ 33. That decision is important because it dealt with the same principal issues brought up by counsel for the plaintiffs. To state it briefly, the Court of Appeal held that:

(a) the law on citizenship is contained, both procedurally and substantively in the FC itself, the constitutionality of the FC is considered from the perspective of the Constitution and it is not to be interpreted by reference to other statutes, even if they were passed by Parliament;

(b) the word 'parent' only means biological parent and does not extend to include adoptive parent, and if the parent is to include adoptive parent, the FC would have expressly provided so;

(c) it is a flawed argument to say that the provisions of the Adoption Act 1952 provided the missing link in interpreting the word 'parent' in s 1(a), Part II, Second Schedule;

(d) the scheme of the provisions under the Adoption Act 1952 does not extend into the realm of the FC in matters of citizenship;

(e) that in determining the citizenship of a person, both the principles of *jus soli* and *jus sanguinis* must be proved; and

(f) in respect to the principle of *jus sanguinis,* it falls upon the applicant to prove that at the time of birth, one of his parents was either a Malaysian citizen or a permanent resident in Malaysia.

[14] The application of both principles of *jus soli* and *jus sanguinis* at the time of birth in the determination of citizenship as elaborated by His Lordship Abang Iskandar JCA (as he then was) in *Pang Swee See* was referred to with approval by the Federal Court in *CBET*.

[15] More importantly, the Federal Court in *CBET* did not approve the Court of Appeal's broad interpretation in *Madhuvita* on the meaning of 'parent' to include non-biological parents such as adoptive parents and that decision must be taken to have been overruled (see *Peguam Negara Malaysia & Anor v Go Fu Seng and other appeals* [2023] 3 MLJ 277; [2022] 9 CLJ 336).

[16] On that basis, this court is bound by *stare decisis* to follow the decisions in *Pang Swee See* and *CBET* and therefore cannot be persuaded to agree with the plaintiffs that a beneficent reading of s 1(a), Part II, Second Schedule together with the provisions of the Adoption Act 1952, in particular s 25A, is permissible, however desirable it may be in the child's interest.

[17] Coming back to the facts in this application and applying *Pang Swee See*, the issue to be determined is whether the plaintiffs have satisfied both parts of s 1(a) of Part II, Second Schedule, that is, that the child:

(a) was born in Malaysia; and

(b) that at least one of the child's parents one is *at the time of birth* either a citizen or permanently resident in Malaysia. The first requirement is

satisfied by the fact that the child was born in Batu Pahat, Johore. The second requirement bears to be proven.

[18] Now, as decided by the Federal Court in *CTEB* the fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning.

[19] Section 1(a) of Part II, Second Schedule makes reference only to the *time of birth* and not at the time the application is made. That requirement is clear and unambiguous. Thus, in determining the status of the child's parent, it is the biological mother's status that must be determined and not the adoptive parents, albeit Malaysian citizens, since there is no adoptive parent at the time of birth. To suggest that at the time of the child's birth, the plaintiffs were already his parents would be clearly impossible and contradictory to the plain meaning of the phrase 'at the time of birth'.

[20] It is clear from the evidence that the biological mother's citizenship and passport were identified in the first BC. The fact that the citizenship and passport number were stated in that document must mean that the passport was within the biological mother's possession or known to the plaintiffs since the first BC was issued after the plaintiffs took steps to adopt the child. There can be no other explanation where that information came from. On that consideration, this court finds on the balance of probabilities that she was in fact a citizen of Sri Lanka and not a Malaysian.

[21] This court does not find the plaintiff's additional affidavit in encl 38 assists the plaintiffs since there was no inquiry made to the Sri Lankan embassy on the citizenship status of the biological mother based on the passport number.

[22] There is also no evidence that the biological mother was a permanent resident of Malaysia. Although she was in Malaysia at the time of giving birth to the child there is no evidence that she had entered Malaysia legally or that her presence in Malaysia was as a permanent resident. There was no inquiry made with the Malaysian Immigration Department on the biological mother's entry into Malaysia or her status.

[23] Based on the above, I find that the plaintiffs have failed to discharge the burden of proving that the biological mother was either a citizen of Malaysia or a permanent resident. For all the reasons discussed above, this court finds no merit in granting the order of citizenship under the first ground.

Second ground

[24] The plaintiffs' contend firstly that, given the fact that the new BC was issued, this court should accept that the child's parents are Malaysians and that the child has not acquired the citizenship of any other country. It was argued that s 1(e) is concerned with only where the child was born and whether the child is stateless.

[25] Since this court is bound by the decisions in *Pang Swee See* that the provisions of the Adoption Act 1952 have no materiality on the determination of citizenship under the FC, the status of the plaintiffs as the adoptive parents cannot be taken into account as of right. The plaintiffs still carry the burden of proving that the child was not born a citizen of any other country.

[26] On finding that the biological mother is a Sri Lankan, it cannot be said that the child was not born a citizen of any other country. As held by the Court of Appeal in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662; [2017] 8 CLJ 16, it fell upon the applicant to prove his lineage under the principle of *jus sanguinis*. In that case, both the applicant's biological parents were unknown and no evidence was offered to prove the lineage of the biological parents. Since the lineage could not be proven, the applicant failed to satisfy s 1(e) of Part II Second Schedule despite spending his life within the Federation:

> [35] A plain reading of para 1(e) 'was not born a citizen of any country' refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. The only available documentary evidence — the second appellant's birth certificate (exh TSB6) contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Diperolehi'.
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> [36] Since the identity of the child's lawful and biological parents are unknown, it is not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage ie *jus sanguinis*.
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> [37] Thus in our view, the second appellant has not fulfilled the requirement to be a citizen by operation of law within the meaning of para 1(e) of Part II of the Second Schedule of the Federal Constitution (refer to *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717).
>
> [38] We cannot accept the contention of the appellants that the evidence that the second appellant was born in the Federation and had resided in the Federation all his life, as well as the absence of particulars on the second appellant's birth certificate in respect of his lineage can be construed as sufficient proof that the second appellant 'was not born a citizen of any country'. As was stated earlier, what is required is evidence of the second appellant's lineage, which evidence is absent.

[27] The decision in *Than Siew Beng* was referred to in the recent High Court decision in *Farah Hani Sukor v Ketua Pengarah Jabatan Pendaftaran Negara, Malaysia & Ors* [2023] MLJU 993; [2023] 1 LNS 898, where like in the present case the identity of the father is unknown and the biological mother gave birth to the applicant in Malaysia. The issue that arose there was whether she was a citizen of Malaysia. The High Court found that there was confusion as to the actual citizenship status of the biological mother, whether the fact that she had a red identity card meant that she was a permanent resident or wether she was a citizen of Singapore. On that basis, the High Court held that the biological mother was stateless and granted the application for citizenship.

[28] In contrast, the facts in the present case show no confusion as to the type of document referred to in first BC. The biological mother was, at the time of the child's birth, a Sri Lankan citizen. It must also be said that there is no evidence that the plaintiffs made any inquiry on the background and citizenship of the biological father when they were in the process of reaching an agreement with the biological mother on the adoption. It is quite inconceivable that no inquiry was made on that matter to ascertain the right of the mother to unilaterally surrender the child for adoption. Thus, this court finds that there was insufficient effort, perhaps even a wilful neglect, by the plaintiffs to ascertain that fact. Therefore, this court finds that the facts in *Farah Hani Sukor* distinguishable. Since the father is unknown, the child must be taken to follow the biological mother's citizenship. The burden is on the plaintiffs to show why she is not entitled to Sri Lankan citizenship, which they failed to do.

[29] In *Azimah bt Hamzah v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2023] 3 MLJ 227; [2023] 3 CLJ 475, the Court of Appeal held that:

> [20] ... if the blood line or parentage can be ascertained, as in this case, then the appellant's nationality at her time of birth can be determined by reference to the nationality of her parents. Her lineage and the citizenship laws governing her parents' nationality would be relevant to determine whether or not the appellant fulfils the requirement that she 'was not born a citizen of any country'. In that event, the appellant though bom on Malaysian soil, would be a person born a citizen of another country, ie Cambodia, by virtue of the principle of *jus sanguinis*. Hence, she would not be stateless at the time of her birth.

[30] Moving on, can the child be said to have been found exposed within the meaning of s 19B of Part III, Second Schedule? Section 19B presumes that when a child is found exposed, the mother is presumed to be a permanent resident and the finding that the child was exposed shall be the date of birth.

[31] Reference was made to the Federal Court decision in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71;

A [2022] 1 CLJ 1, FC where the meaning of the term 'exposed' under s 19B was discussed:

> [53] The operative words in s 19B are 'any new born child found exposed in any place'. The purpose of this section, when read in context, must be to cover new born children who are left and discovered in a place *without any trace of their biological parents*. We take judicial notice of the harsh realities of life: this includes new born children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of 'exposed' suggests a new born child who was 'discovered' exposed at any of these locations. (Emphasis added.)
>
> [54] As such, the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word 'exposed' in s 19B must therefore encompass the plight of abandoned new born children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.

[32] In light of that definition, can the child be said to have been abandoned or exposed? The respondents contend that the facts of abandonment were not proven by the plaintiffs.

[33] The facts here show that after the child was born, the child remained with the biological mother up until the plaintiffs met her some eight months after she had handed the child to them. Thus, unlike in *CCH*, the mother remained with the child until she was given up for adoption. In this court's view, those facts do not show any abandonment amounting to leaving the child exposed without any trace of the biological parent.

[34] Since this court does not find that the child was found exposed, both presumptions under s 19B Part III, Second Schedule, that is:

(a) the child is born to a mother who is permanently resident at the place where the finding was made (the *jus sanguinis* presumption); and

(b) the date of the finding is taken as the date of the birth, cannot be triggered in favour of the plaintiffs. It is a principle of law that for a presumption to apply, the fact or condition triggering the presumption must first be proved. As was stated by Thomson CJ in *Ng Kim Huat v Public Prosecutor* [1961] 1 MLJ 308; [1961] 1 LNS 73 referred to with approval in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137; [2022] 1 CLJ 491:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent

of the presumption ahsing. To say otherwise would be to fly in the face of all the rules of logic.

[35] On the issue that this court should adopt an interpretation of the law that will be in the interest of the child, this court cannot disagree that the non-granting of citizenship to the child will pose challenges to the plaintiffs as parents, the child as an individual and both the plaintiffs and the child as a family unit. However, it would be necessary to quote what was said by Rohana Yusuf PCA in delivering the Federal Court's decision in *CTEB*:

> [22] Learned counsel for the appellants, Dr Cyrus Das impressed upon us to bear in mind two main principles in construing the relevant constitutional provisions. First, to adopt an interpretation enabling the availing rights. He submitted that in the process of interpreting constitutional provisions to the citizen, it should be done in ways so as to enable availing right be given and not to deny or denude them, citing in support the Supreme Court of India in *Post-Graduate Institute of Medical Education and Research v KL Narasimhan* [1997] AIR 3687 (SC).
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> [23] The second principle is where it involves the welfare of a child, any likely breakup of the family unit will be relevant. He then cited Lord Wilberforce in *Minister of Home Affairs and Another v Collins Macdonald Fisher and Another* [1980] AC 319 which emphasised on family unity and non-separation of a child from the family.
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> [25] The point to be noted is, this is not a case where conferment of the rights of citizenship was made to the children merely to ensure no family break up. No country in the world will grant citizenship to anyone without meeting the required criteria and family breakup may be a consideration but not the reason or criteria accepted. Thus, what the court did in that case was only to allow them to stay in Bermuda till they reach 18 years old.
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> [26] Nobody can disagree that family should not be separated. However, the issue before us is whether avoiding family separation necessarily entitled the child in this case to a *citizenship by operation of law*. I am not saying that he cannot be a citizen pursuant to art 15. The non-separation phnciple may be relevant for the authorities to consider in the exercise of its discretion pursuant to art 15. That is where the requirement of discretionary power sets in. Hence, I do not find the case of much help to advance the principle of law on family separation in the context of this appeal. (Emphasis added.)

[36] On the same tone, this court opines that the mischief of granting citizenship to the child so as to protect the welfare of the child is conditional upon the satisfaction of the criteria for citizenship in accordance with the law. Citizenship is not granted merely to serve the child's welfare. The child is now blessed with the presence of the first and second plaintiff as parents who will nurture and raise the child with love and care and this court is certain that they will do their utmost best in the meantime to provide the child with the best environment until an application is made under art 15 of the Federal Constitution.

A CONCLUSION AND DECISION

[37] Based upon all the above, the court finds that the criteria for citizenship by operation of law under the FC have not been met. The application is hereby dismissed with no order as to costs.

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Plaintiffs' application dismissed.

Reported by Ashok Kumar

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